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FILED
DEC 9 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 525

EMMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GELCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of Harold Swartz, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,
Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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No. 525

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of Harold Swartz, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,
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ALLSTATE INSURANCE COMPANY, an Illinois Corporation,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

CONCISE STATEMENT OF CASE

Respondent, Allstate Insurance Company, as plaintiff, brought an action against Erma F. Springer and her husband, Murl D. Springer, and others, as defendants, pursuant to the Declaratory Judgment Act to obtain an adjudication that a policy of automobile insurance issued by it to Erma F. Springer was void from its inception for fraud and should be cancelled, and that a rescission of the policy had been effected by mutual agreement of the insurer and the insured.

The facts are adequately stated in the opinion of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I shall reply *seriatim* to the points of the petitioners' argument, under the captions adopted by them.

SUFFICIENCY OF EVIDENCE TEST

Federal district courts, on request, should direct a verdict or give peremptory instructions for party having burden of proof, if evidence establishes facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto, even though State rule is purportedly to the contrary.

> *Davis Frozen Foods, Inc, vs. Norfolk Southern Ry. Co.* (C. C. A. 4), 204 F. 2d 839.

In determining whether there is sufficient evidence to take the case to the jury, a Federal judge performs a judicial function and is not a mere automaton, and must determine not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it. In this connection it should be noted that State court rule as to sufficiency of evidence does not apply in cases in Federal courts where jurisdiction is based upon diversity of citizenship, despite the Erie doctrine, since Federal rules provide for kind of jury trial in Federal courts that is preserved by the Seventh Amendment, and Erie doctrine is subservient to Constitutional provision.

> *Reuter vs. Eastern Air Lines* (C. C. A. 5) 226 F. 2d 443;
> *Burcham vs. J. P. Stevens & Co.* (C. C. A. 4) 209 F. 2d 35;
> *Diederich vs. American News Co.* (C. C. A. 10) 128 F. 2d 144.

Under Federal law, where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to

leave no room to doubt what the fact is, the Court should give a peremptory instruction to the jury.

Gunning vs. Cooley, 281 U. S. 90;
Coen vs. American Surety Co. of New York (C. C. A. 8), 120 F. 2d 393.

Michigan law is not materially different.

Under Michigan law, where the testimony is all one way, is uncontradicted by any testimony given in the case by the witnesses of either party, either on direct or cross-examination, or by any facts or circumstances in the case, is not in itself in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff or a defense made for the defendant, the duty rests upon the Court to direct a verdict.

Boudemin vs. Arnold, 200 Mich. 162.

It is prejudicial error for a court to submit as open questions to the jury matters which are not in dispute, or upon which the testimony is not conflicting.

Lange vs. Perley, 47 Mich. 352;
Corbett vs. Spencer, 63 Mich. 731.

It is error to direct the attention of the jury to undisputed facts as if they were doubtful.

Seligman vs. Estate of Ten Eyck, 49 Mich. 104.

I shall demonstrate in the succeeding paragraphs that application of any of the foregoing tests to the record made in the present case will make it clear that the Court of Appeals correctly held that the District Judge erred in submitting to the jury the interrogatories labelled "First Question," "Second Question," and "Third Question," and in refusing to give to the jury peremptory instructions in keeping with Allstate's requests.

ISSUES OF FACT ON SPECIAL INTERROGATORIES

Long prior to the trial of this action, Federal courts had already recognized that a jury cannot declare a policy

of insurance null and void or direct its cancellation, and that in an action of this nature triable issues of fact must be submitted to the jury in the form of interrogatories. They also recognized, however, that it is error for a court to submit as open questions to the jury matters which are not in dispute or upon which the testimony is not conflicting.

Great Northern Life Ins. Co. vs. Vince (C. C. A. 6), 118 F. 2d 232;
Smith vs. John Hancock Mutual Life Ins. Co. (C. C. A. 5), 249 F. 2d 657.

The Answers to Questions 6 and 7 Appearing in The Policy Declarations Were False.

The answers made by Erma F. Springer to both questions 6 and 7 in her application for the policy of insurance were palpably false. Citizens' Mutual Automobile Insurance Company had cancelled a policy of automobile insurance issued by it to her husband within less than sixty days prior to the date of her application to Allstate. On the trial of the action, counsel for petitioners advanced the theory, which they now urge before this Court, that the Citizens' Mutual policy was terminated through voluntary surrender thereof by Murl D. Springer and not by cancellation. The District Judge properly rejected this theory. The Court's ruling appears in the Appendix as follows (102a, 103a):

"Q. Mr. Springer, when you got this telephone call from Mr. Gomery, did you then take the policy of insurance voluntarily —

"A. (Interrupting): Yes, sir.

"Q. (Continuing): — in to Mr. Gomery's, and surrender it?

"A. Yes, sir.

"Q. And that policy and your surrender of it was accepted by Mr. Gomery, is that right?

"A. Yes, sir.

"MR. ROGOSKI, SR.: I object to that as calling for an incompetent conclusion.

"THE COURT: Well, it seems very plain that he took in this policy to Gomery's office, because Gomery

had telephoned him the policy was cancelled. Now he took the policy in and gave it to Mr. Gomery in his office.

"THE WITNESS: That is right.

"THE COURT: And you did that because you had been informed that it was cancelled?

"A. Yes, sir."

The notice of cancellation was brought to Murl D. Springer's attention, he recognized the right of the insurer to cancel, acquiesced in the cancellation, and accepted a check for the return of unearned premium. He acknowledged the cancellation in an application for insurance made through the Assigned Risk Plan (Plaintiff's Exhibit 8 (52a, 330a). This Exhibit was not included in the Appendix but is on file with the Clerk of the Court of Appeals).

Murl D. Springer's driver's license had been automatically suspended when his policy of insurance with Citizens' Mutual was cancelled, and he was required immediately to return to the Michigan Secretary of State his license and registration.

> Section 530 of the Michigan Vehicle Code, Act No. 300 of the *Public Acts of Michigan* of 1949 (*Compiled Laws of Michigan* of 1948, Section 257.530; *Mich. Stat. Anno.*, Section 9.2230).

Recognizing the suspension, Springer himself had mailed his driver's license to the Secretary of State (59a, 64a).

The evidence exposing the false answers to questions 6 and 7 was uncontroverted and undisputed.

The Facts Relied Upon by Allstate to Sustain its Claim That a Rescission of The Policy Had Been Effected by Mutual Agreement of The Insurer And The Insured Were Undisputed.

The scheme by which the Springers obtained the policy from Allstate was flagrantly fraudulent. Murl D. Springer understood that Allstate would not have intentionally covered him by the policy, he having testified (106a):

"Q. You understood if you were driving that policy would not cover you?

"A. Yes, I understood that."

Erma F. Springer had been alerted to the fact that the insurer intended to declare the policy void from the beginning because of false answers contained in the policy declarations (237a, 238a). She testified (253a):

"Q. You knew that Allstate was planning to declare the policy void, from the talk you had with Mr. Marks there on November 16th, didn't you?

"A. I knew that, on November 16th, yes."

When the Springers were informed that the Company charged that they had made false answers in the policy declarations, they made no denial or protest (109a). When Mrs. Springer received the notice declaring the policy void, and the check for the refund of the premiums, she understood their purpose.

An agreement to rescind a contract may be shown by such circumstances or by such course of conduct as clearly evidences the intention of the parties that it should so operate.

White Pine Lbr. Co. vs. Manufacturers Lbr. Co., 191 Mich. 390.

Mrs. Springer recognized Allstate's right to rescind by accepting the return of all premiums paid by her, accompanied by a written denial of liability, and by her retaining such premiums.

Minor vs. Bewick, 55 Mich. 491;
McCutchan vs. Kansas City Life Ins. Co., ... Mo. ....., 122 S. W. 2d 59.

With respect to any claim by the Springers that they did not intend to acquiesce in the rescission, it is only necessary to reply that one must be held to have intended the necessary and direct consequences of his acts, and he cannot be heard to say to the contrary.

Whether or not intention to rescind a contract or provision thereof was present at the time the acts relied on in

that regard were done becomes a question for the Court where the facts are admitted or clearly established.

Klanian vs. New York Life Ins. Co., 68 R. I. 126, 26 A. 2d 608, 152 *A. L. R.* 87;
Annotation to the case last cited, 152 *A. L. R.* 95.

It would seem difficult to make the evidence of rescission more conclusive than it was here.

Hillock vs. Traders Ins. Co., 54 Mich. 531;
Mosser vs. Masons' Indemnity Co., 115 Mich. 672.

Where, as in the present case, an insurer elects to rescind a contract of insurance and the insured acquiesces in the rescission, the rescission is effected by agreement of the parties, and the insured's retention of the returned premiums operates as an accord and satisfaction.

3 *Appleman's Insurance Law and Practice*, 439, Section 1831.

The Court of Appeals therefore properly held that the question respecting rescission was improperly submitted to the jury and that the jury's finding in answer to the First interrogatory should be set aside.

COUNSEL DID COMPLY WITH RULE 51

Petitioners' contention that respondent's counsel failed to comply with Rule 51 is manifestly opposed to the record. At the conclusion of all the evidence, counsel for respondent made a motion for a directed verdict. The motion included the following grounds (265a, 266a):

"Third, it affirmatively appears from the undisputed evidence that Allstate assumed liability under said policy in reliance upon an answer, a negative answer to Question 6, which answer appears without dispute to be false and to relate to a material matter.

"Fourth, it appears affirmatively from the undisputed evidence that the insured gave a false answer to Question 7, and that Allstate Insurance Company

accepted the risk in reliance upon the answer given, which was material to the risk.

"Eighth, because it conclusively appears from the undisputed evidence that a rescission of the contract of insurance was effected by agreement of the parties as a result of Allstate's having served upon the insured a notice of disclaimer of liability or of rescission, together with the tender of a check covering all premiums paid by her, and by the insured's accepting and negotiating the check, and retaining the proceeds thereof."

Counsel for respondent proffered to the District Judge requests to charge the jury, as follows (275a):

"I charge you that you should find, as a matter of fact, that the answer contained in the policy declarations to question number 6 was false, in that a policy of automobile liability insurance issued by Citizens' Mutual Automobile Insurance Company to the defendant, Murl D. Springer, was cancelled by notice effective February 16, 1954." (No. 37).

"I charge you that you must find, as a matter of fact, that the answer to question number 7 contained in the policy declarations was false, in that the driver's license of the defendant, Murl D. Springer, was suspended at the time that his wife made application for insurance to the plaintiff." (No. 38)

The Judge refused to give the requests. Counsel for respondent unequivocally excepted to the ruling. The exceptions were in the words following (291a, 292a):

"The plaintiff excepts to the court's refusal to give its 37th request to charge, because counsel for the plaintiff feels that the undisputed facts establish the plaintiff's claim that there was actually a cancellation of the Citizens Mutual policy within the period specified; in fact, in close proximity to the insured's making the application, and that issue should not be submitted to the jury, as if it was a controverted one.

"Plaintiff excepts to the refusal of the court to give its 38th requested instruction, because plaintiff feels that it appears from the undisputed evidence that there was a suspension of Murl D. Springer's license within the specified period, and within the period shortly antedating the application for the Allstate policy, and for that reason the jury should not be allowed to treat the falsity of the answer to question 7 as a question of fact."

The preservation of respondent's right to have the Court of Appeals review the denial of its motions for a directed verdict and notwithstanding the verdict on the ground that a rescission of the policy had been effected by mutual agreement of the insurer and the insured was not lost by any failure to except to the Court's charge.

The question presented by this division of petitioners' petition was first raised by their motion for a rehearing made to the Court of Appeals.

CONCLUSION

For the good reasons hereinabove stated, the petition should be denied.

Respectfully submitted,

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